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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1007

ROBERT V. FERRY, IRVING BAKER AND AUTRICE COPELAND FREEMAN, PETITIONERS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is reported at 336 F. 2d 706. The opinions of the district court are not reported. They are set forth at pages 14a–15a of Petitioners' Appendix.

JURISDICTION

The judgments of the court of appeals were entered on September 9, 1964 (Pet. App. 1a). Timely petitions for rehearing *en banc* were denied on October 21, 1964. On January 21, 1965, Mr. Justice Douglas signed an order extending the time for petitioning

for a writ of certiorari to March 20, 1965. The instant petition was filed on March 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Acting under a statute empowering the Secretary of the Interior to sell at public auction isolated tracts of public lands "which, in his judgment, it would be proper to expose for sale," and to execute this task by means of "appropriate regulations," the Secretary issued a regulation specifying that no rights of any kind accrue to a prospective purchaser until a cash certificate has been issued to him. The question presented is whether this regulation is valid.

STATUTES AND REGULATIONS INVOLVED

Section 2455, Revised Statutes, as amended, 43 U.S.C. 1171, referred to herein as the "Isolated Tracts Act," provides:

> *Sale of isolated or disconnected tracts.* Notwithstanding the provisions of section 678 of this title and of sections 212, 321, 662, and 945 of this title, it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated * * *.

Section 2478, Revised Statutes, as amended, 43 U.S.C. 1201, provides:

> *Power of Secretary or designated officer.* The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

The regulation of the Secretary of the Interior involved is 43 C.F.R. (1954 rev.) 250.5, which provides:

> *Effect of application.* The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from other application under the public land laws, or defeat a prior valid right initiated under any such law. However, until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States.

Section 250.12(c) of the Secretary's regulations (43 C.F.R.) provides:

> When there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser.

STATEMENT

The petition in this case relates to two separate actions founded on similar factual situations and presenting the same basic issue of law. The district

court entered summary judgment for the defendants, the Secretary of the Interior and his subordinate officials, in each case and on identical grounds (Pet. App. 14a–15a). The actions were consolidated in the court of appeals (Pet. App. 1a). The essential facts are as follows:

The Secretary invited bidding on certain isolated tracts of public lands exposed for sale pursuant to his authority under the Isolated Tracts Act, R.S. Sec. 2455, as amended, 43 U.S.C. 1171 (Ferry R. 102; Freeman R. 58). Ferry and Freeman submitted bids on the particular tract involved in their respective cases. Each was declared by the local Land Manager to be the high bidder, paid the bid price, and received a receipt therefor (Ferry R. 79; Freeman R. 107–109). Following prolonged proceedings within the Interior Department to resolve challenges by other individuals to the rights of Ferry and Freeman to receive the tracts, the Secretary upheld the Manager (Ferry R. 27–31; Freeman R. 96–100). In each case, however, before a cash certificate was issued and following an investigation directed by the Secretary, the Secretary determined that the proper appraised value of the land at the time the bids were received was several times higher than the bid price.[1] For

[1] In the *Ferry* case, the original Bureau appraisal, made some time before the bidding, was $24,235.55; the bid was $32,500; and the subsequent appraisal made as of the date of the bidding was $93,500 (Pet. App. 2a–3a). In the *Freeman* case, the original Bureau appraisal was $39,516.40; the bid was $39,517; and the subsequent appraisal made as of the date of bidding exceeded the bid by more than six times (Freeman R. 88, 93; Pet. App. 2a–3a).

that reason, the Secretary vacated the sales (Ferry R. 36; Freeman R. 88; Pet. App. 3a).

Ferry and Freeman then brought these actions for relief under the Administrative Procedure Act, 5 U.S.C. 1009. The district court granted summary judgment for the defendants on the basis of the Secretary's regulation (43 C.F.R. 250.5), which provides that "until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold * * * and no action taken will create any contractual or other obligation of the United States." Since the alleged sales in the present case had not been completed by the issuance of the required cash certificates, by the very terms of the regulation the Secretary at all times retained his statutory authority "to determine that the lands should not be sold" and the petitioners obtained "no contractual or other rights as against the United States" (43 C.F.R. 250.5). In short, petitioners' offers were never accepted and they obtained neither legal nor equitable rights to the lands (Pet. App. 14a–15a). The court of appeals affirmed (Pet. App. 1a–13a).

ARGUMENT

The decisions of both courts below are plainly correct and are not in conflict with the decision of any other court. Accordingly, there is no occasion for further review.

1. This Court recently denied review of an almost identical holding in *Willcoxson* v. *United States,* 313

F. 2d 884 (C.A.D.C.), certiorari denied, 373 U.S. 932.[2] Here, as in *Willcoxson*, the complete answer to petitioners' reasoning and authorities is that Congress, in giving the Secretary of the Interior unqualified discretion to decide whether and when a particular isolated tract should be sold at auction, necessarily clothed him with authority to prescribe the terms of the sale and, specifically, to designate what action on his part would constitute a definitive acceptance of an applicant's offer to buy. Cf. *Erie Coal & Coke Corp.* v. *United States*, 266 U.S. 518, 520-521; Restatement of Contracts, Sec. 27. Here, the Secretary provided by regulation (43 C.F.R. 250.5), that "until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States." It was subject to this reservation that the lands were offered and petitioners invited to bid. The regulation plainly states that prior to the issuance of a cash certificate no rights accrue

[2] In *Willcoxson*, the Secretary refused to complete the "sale" under the Isolated Tracts Act on discovering that the lands contained valuable minerals because he believed that he was prohibited by the mining laws, 30 U.S.C. 21 *et seq.*, from selling such lands. Here, the Secretary has taken the same action because he believed that, by the terms of the Isolated Tracts Act itself, he was prohibited from selling the lands at less than their fairly appraised market value. Thus, contrary to petitioners' contention (Pet. 27), the two cases are fully parallel and, as the court below said (Pet. App. 7a), the "result we reach is identical in principle with that of *Willcoxson*."

to a bidder, even though he might be called a "purchaser," as a result of preliminary "action taken" on the bidding.

The auction notices expressly made bidding subject to the provisions of the Isolated Tracts Act (Ferry R. 102; Freeman R. 58). Prospective applicants were thus put on notice of the applicability not only of the statute but also of the regulations adopted expressly pursuant to and in execution of the Isolated Tracts Act (43 C.F.R. 250.1). Cf. *Chapman* v. *Sheridan-Wyoming Co.*, 338 U.S. 621, 626. Indeed, the appearance of these regulations in the Federal Register alone gave legal notice of their content to all affected thereby, consequently binding each petitioner herein. 44 U.S.C. 307. If petitioners considered the reservation unacceptable, they were free not to bid.

Finally, there is, of course, no conflict between the regulation relied upon in this case, 43 C.F.R. 250.5, and a further regulation providing that "when there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser." 43 C.F.R. 250.12(c). The latter regulation authorizes the manager to issue a cash certificate when all the requirements of the statute and regulations have been complied with. Section 250.5 is intended to prevent the creation of any rights against the United States pending a final decision by the Department of the Interior and formal acceptance of the applicant's offer so that the Secretary may take into account any facts or events coming to his attention between the time of his initial decision to sell the

land and his final acceptance of an offer by issuance of a cash certificate. The use made of Section 250.5 in the present case and in *Willcoxson* is the very purpose of the provision. The regulation is an eminently reasonable protection of the public interest and does not conflict in any way with the legitimate rights or expectations of private individuals.

2. Petitioners' contention (Pet. 18–26) that the decisions below are in conflict with decisions of this Court is groundless. *Wyoming* v. *United States*, 255 U.S. 489—upon which they chiefly rely—arose under a statute whereby Congress itself appropriated certain lands for selection by the States, leaving to the land officers merely the nondiscretionary task of ascertaining whether the State's selection met the requirements of the congressional offer. Since the selection was not "merely a proposal by the State which the land officers could accept or reject," and since the "power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised * * *" (*id.* at 496), the Court held that equitable title vested at the time of the selection and not at the time of the officers' later approval. Here, the crucial distinction, as the court below recognized (Pet. App. 4a–5a, 12a–13a), is that the Isolated Tracts Act entrusted to the Secretary's discretion the very decision that was outside his authority in the *Wyoming* case—whether to sell the tracts at all; petitioners' application was merely a proposal which the Secretary was free to accept or

reject, and in a manner defined by him in advance. See *United States* v. *Ickes,* 72 F. 2d 71, 73–76 (C.A.D.C.).

Statements in the *Wyoming* case that the right to the land vests when the price is paid (Pet. 19, 21) were merely descriptions of the legal consequences of a cash entry under statutes where the Secretary has no authority to refuse to sell or lease land. In this situation, the applicant's rights vest by virtue of the statutory grant upon compliance with the statute's requirements. As the Court of Appeals for the District of Columbia noted in *Willcoxson,* the situation is entirely different under the Isolated Tracts Act: "An application for sale of an isolated tract is 'merely a proposal by the [applicant] which the land officers [can] accept or reject.' *Wyoming* v. *United States, supra,* 255 U.S. at 496. By providing that the authorized land officer may decide not to sell at any time prior to the issuance of a cash certificate, the regulation in effect denotes issuance of the certificate as acceptance of the applicant's proposal. In ordinary contract parlance, the sales were auctions with reserve. Restatement, Contracts § 27. Until acceptance, no contract rights arose and no equitable title vested. The *Wyoming* and similar cases cut off from consideration only facts arising after the vesting of rights. In the present case, since no rights in the tracts ever vested, the Manager was free to consider any facts discovered before the issuance of a cash certificate." 313 F. 2d at 888.

Similarly, the statements relied upon by petitioners (Pet. 18–26) from earlier cases—none of which involved the issue presented here—were simply descriptive of the cash-sale procedures there applicable—procedures under different statutes in cases antedating adoption of the regulation which is controlling in this case.[3]

3. The court below correctly accorded no validity to petitioners' effort (Pet. 29–33) to find in various provisions of the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, severe limitations on the discretion conferred upon the executive officer in the Isolated Tracts Act, 43 U.S.C. 1171. The discretionary provision of the Isolated Tracts Act has been in effect since 1846 (Sec. 2455, Revised Statutes), long antedating the Taylor

[3] All of the cases are readily distinguishable. For example: *Benson Mining Co.* v. *Alta Mining Co.*, 145 U.S. 428, involved a dispute between applicants for a patent to mineral lands and a subsequent locator. The Court held (pp. 431–432) that "when the price is paid the right to a patent immediately arises" because Section 2325, Revised Statutes, pertaining to mineral lands, provided, with respect to mineral lands, that "it shall be assumed that the applicant is entitled to a patent, upon payment to the proper officer * * *." There is no such provision in the present statute. In *Carroll* v. *Safford*, 3 How. 441, the Court held that, where a purchaser had paid the price for public land and been granted a patent certificate but not yet the patent itself, Michigan could tax the property because the purchaser "held for it a final certificate, which could no more be cancelled by the United States than a patent" (p. 460). No such certificate has been issued in the present case. In *Atherton* v. *Fowler*, 96 U.S. 513, the principal issue was whether a person who had entered upon land by forcefully dispossessing a prior occupant could succeed to the latter's rights of pre-emption, the Court holding not. Neither *John W. Stanton*, 50 I.D. 242, nor *State of Wisconsin, et al.*, 65 I.D. 265, treated a regulation like that involved here.

Act. It remains unchanged to the present day. The fact that in 1934 the Taylor Grazing Act (Section 14) was used as a means of enlarging (by amendment) the acreages permitted to be sold and of changing the fixed per-acre price to an appraised price did not affect the discretion of "the Secretary of the Interior to order into market and sell at public auction" isolated tracts "which, in his judgment, it would be proper to expose for sale." Nothing adverted to by petitioners in the Taylor Grazing Act or elsewhere has amended or qualified the long-standing general discretion clearly set forth in that language.

4. Petitioners' contentions that they were entitled to a hearing and to judicial review under the Administrative Procedure Act are premised on the assumptions that they had "an equitable interest" and that "the Government cannot avoid a contract" (Pet. 36). But, under Section 250.5 of the Secretary's regulations, "until the issuance of a cash certificate * * * the applicant or any bidder has no contractual rights as against the United States, and no action taken will create any contractual or other obligation of the United States." The validity of this regulation and thus the existence *vel non* of contract rights of the petitioners was, of course, litigated before and decided by the courts below. The petitioners are not entitled to an administrative hearing or judicial review of the question whether the Secretary should have accepted their offers. As the court below held (Pet. App. 13a), "there is no constitutional requirement to a right to a hearing where only a potential privilege to purchase United States land is involved." Finally, Section 10

of the Administrative Procedure Act, 5 U.S.C. 1009, excepts from judicial review agency action which is by law committed to agency discretion. The administrative action taken in the present case—the decision not to accept petitioners offers—plainly falls into this category, as the court below held.

The Isolated Tracts Act neither instructs the Secretary as to whether or when he should dispose of the property nor requires that he furnish any reason for his decision not to dispose of it. Similarly, the Secretary's regulations contain no requirement that he reveal the bases of his decision not to dispose of such isolated tracts. In short, the Secretary is not required by any provision of law to explain the reasons for his decision that the disposal of particular land would be contrary to the public interest. Consequently, potential vendees, who by the explicit terms of the regulations have no legal or equitable rights before issuance of a cash certificate, cannot demand to be heard either before or after the Secretary has exercised this wholly discretionary function.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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